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No. 07-526

In The Supreme Court of the United States

DONALD L. CARCIERI, in his capacity as Governor of the State of Rhode Island, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and TOWN OF CHARLESTOWN, RHODE ISLAND,

Petitioners,

v.

DIRK KEMPTHORNE, in his capacity as Secretary of the United States Department of Interior, and FRANKLIN KEEL, in his capacity as Eastern Area Director of the Bureau of Indian Affairs,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, FLORIDA, ILLINOIS, IOWA, KANSAS, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEBRASKA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* States (the "*Amici* States"),[1] through their Attorneys General, submit this brief in support of the brief filed by the State of Rhode Island.

The *Amici* States have a vital interest in this case because the First Circuit's decision misinterprets two federal statutes, the Indian Reorganization Act of 1934 ("the IRA")—which grants the Secretary of the Interior ("the Secretary") authority to take land within any State into trust "for Indians"—and the Rhode Island Indian Claims Settlement Act ("the Settlement Act"), which contains provisions mirrored in Indian land claim settlement acts nationwide. Land taken into trust for Indians by the Secretary is removed from state authority in several significant respects (including taxation, land use restrictions and certain environmental regulations), thereby limiting the States' ability to exercise their sovereign powers to protect the public on the trust land. 25 C.F.R. § 1.4(a). Thus, the result of the Secretary's taking land into trust is the creation of an area largely controlled by a competing sovereign within a state's borders without its consent, contrary to core principles of federalism.

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[1] The *Amici* States are: Alabama, Alaska, Arkansas, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas and Utah.

The First Circuit's erroneous interpretation of federal law has resulted in an expansion of land taken into trust and thereby removed from the States' jurisdiction. The Secretary has already taken into trust several million acres nationwide pursuant to the IRA under § 465 (an area approximately twice the size of Connecticut and Rhode Island combined) and receives a large number of applications annually to take additional land into trust. The *Amici* States have a compelling sovereign interest in having this Court define the proper application of the IRA, particularly in conjunction with settlement acts.

SUMMARY OF THE ARGUMENT

The Secretary's power to take land into trust pursuant to the IRA enables him to administratively create areas within a state's borders at the behest of an Indian tribe that are, in many key respects, outside that state's jurisdiction. Consequently, the exercise of that power has substantial, and permanent, consequences for the impacted state and local communities. Indeed, that power gives the Secretary the capacity to change the entire character of a state, particularly when the Secretary uses it in coordination with modern Tribes, some of which have developed substantial wealth, through Indian gaming or otherwise, and are located in populated areas and existing communities.

Given the repercussions of the power to take land into trust and the Secretary's guardianship relationship with the tribes on whose behalf he exercises it, it is incumbent on the courts to

vigilantly enforce the limits Congress has placed on the Secretary's power in order to maintain the proper separation of powers. The First Circuit did precisely the opposite. Although the IRA unambiguously allows the Secretary to take land into trust only on behalf of tribes that were recognized and under federal jurisdiction in 1934, the First Circuit strained to inject ambiguity into the statute and then deferred to the Secretary's construction, which is directly contradicted by both the text and context of the IRA as informed by this Court's decisions and by the IRA's legislative history. In so doing, the First Circuit abdicated its judicial function and deferred to the Secretary's vast expansion of his trust power at the expense of the States, in violation of the limits Congress has so clearly imposed.

The First Circuit exacerbated its error by interpreting the Rhode Island Settlement Act—which reflects the clear intent of Congress and the parties to grant the Narragansett Tribe a substantial land base in exchange for submitting to state jurisdiction—to permit the Tribe to enlist the Secretary to take additional land outside the settlement area into trust, thereby removing it from state jurisdiction and allowing the Tribe to build a housing complex without obtaining any of the approvals intended to protect public safety. This leads to the absurd result that Rhode Island has more power to protect the fish on the Tribe's settlement lands than it does to protect the humans on the trust lands, even though Rhode Island explicitly protected its jurisdiction through the hard-fought negotiations that led to the Settlement Act. As Judge Howard and Judge Selya argued in

their dissents, neither Congress nor the parties intended such a bizarre result.

ARGUMENT

I. THE FIRST CIRCUIT MISCONSTRUED THE IRA TO GRANT THE SECRETARY AUTHORITY NOT INTENDED BY CONGRESS

A. THE TEXT AND THE CONTEXT OF SECTION 479 UNAMBIGUOUSLY LIMIT THE SECRETARY'S AUTHORITY TO TRIBES RECOGNIZED PRIOR TO 1934

The first question presented—whether the First Circuit's deference to the Secretary's interpretation of the IRA to allow him to take land into trust on behalf of the newly recognized Narragansett Tribe was proper—involves a straightforward application of this Court's *Chevron* framework. "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Thus, an agency's interpretation of a statute is entitled to deference "only where 'Congress has not directly addressed the precise question at issue' through the statutory text." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S. Ct. 2518, 2534 (2007) (quoting *Chevron*, 467 U.S. at 843).

The precise question at issue in this case is whether Congress in the IRA intended to allow the Secretary to take land into trust on behalf of Indian tribes, like the Naragansett Tribe, that were not recognized and under federal jurisdiction in 1934, when the IRA was enacted. Congress addressed that precise temporal question in the IRA's text and unambiguously provided that the Secretary's authority to take land into trust is limited to pre-1934 tribes. The IRA allows the Secretary to take land into trust "for the purpose of providing land for Indians," 25 U.S.C. § 465, and defines "Indian" to "include all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*." 25 U.S.C. § 479 (emphasis added). Congress' use of the word "now" unambiguously expresses its intent to limit the Secretary's trust authority to tribes that were recognized and under federal jurisdiction *at the time of the IRA's enactment in 1934*.

Prior to the decision below, every circuit court to address the issue—as well as this Court—agreed with the *Amici* States' reading of the IRA. This Court noted that "[t]he 1934 Act defined 'Indians' as [*inter alia*] . . . 'all persons of Indian descent who are members of any recognized [in 1934] tribe now under Federal jurisdiction.'" *United States v. John,* 437 U.S. 634, 650 (1978) (latter bracketed material in original) (quoting 25 U.S.C. § 479). Even assuming *arguendo* that this language was not holding, it demonstrates that the IRA unambiguously applies only to 1934 tribes.

The circuit courts to address the issue stated their views equally clearly. The Ninth Circuit concluded that the IRA "by its terms" does not apply to tribes not under federal jurisdiction in 1934[2] and the Fifth Circuit held that the statute "positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words any recognized Indian tribe *now* under Federal jurisdiction and the additional language to like effect." *United States v. State Tax Comm'n*, 505 F.2d 633, 642 (5th Cir. 1974) (emphasis in original) (quotation marks omitted). The consensus among the courts to address the meaning of the term "now" in Section 479 "rule[s] out any serious claim of ambiguity." *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 594 (2004) *see also New York v. EPA*, 443 F.3d 880, 886 (D.C. Cir. 2006)*, cert. denied*, 127 S. Ct. 2127 (2007).

Apart from the IRA, this Court has repeatedly held in analogous circumstances—both before and after the passage of the IRA—that when Congress uses the word "now" in a statute, it intends to incorporate a temporal limitation as of the date of enactment. *See, e.g.*, *Montana v. Kennedy*, 366 U.S. 308, 311 (1961); *see also Weedin v. Chin Bow*, 274 U.S. 657 (1927).

Montana—involving the interpretation of statutes governing citizenship—is instructive. There, the Seventh Circuit held that "a fifty-five year old man who has resided in this country since he was an infant" could not validly claim

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[2] *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004).

citizenship under those statutes and could therefore be deported. *Montana*, 366 U.S. at 310. This Court "granted certiorari to review that conclusion in view of the apparent harshness of the result entailed." *Id.* at 309. It nonetheless held that it was bound by the clear language of the statutes and affirmed the decision below. *Id.*

There, as here, the outcome of one of the petitioner's claims hinged on the meaning of the term "now" in the statute. The citizenship statute applied to "children of persons who *now* are, or have been citizens of the United States." *Id.* at 310 (emphasis added). This Court held that, by its terms, the statute encompassed only individuals who were citizens "*on* . . . the effective date of the . . . statute" and that the statute "had no prospective application." *Id.* at 311. Therefore, the petitioner's claims had to fail, notwithstanding the acknowledged harshness of the result. This interpretation of the effect of the statutory term "now" was consistent with the view of commentators and this Court's decisions issued prior to the IRA's enactment. *Id.* at 312. Thus, this Court has consistently made clear that "now", as used in a statute, unambiguously means at the time of enactment, and the First Circuit erred in finding ambiguity in the IRA's use of the term.[3]

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[3] The First Circuit did not point to a single decision interpreting "now" in the IRA, or a similar statute, to mean anything other than at the time of enactment, and acknowledged that *Montana*—which addressed an analogous circumstance—supported the conclusion that "now" meant as of 1934. *Pet. App.*, 19. It nonetheless concluded that

An examination of the context provided by the IRA's other provisions further evidences Congress' unambiguous intent. *See, e.g.*, *Nat'l Ass'n of Home Builders*, 127 S. Ct. at 2534 (noting that "[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Those provisions demonstrate that the 1934 Congress carefully distinguished between its use of "now"—intended to mean at the time of enactment—and other phrases intended to "operat[e] . . . at the moment the Secretary invokes it." *Pet. App.*, 20.

For example, Section 465 refers to "measures *now* pending in Congress," which, of course, means measures pending at the time of the IRA's enactment. (emphasis added). By contrast, Section 468 encompasses both past and future events by referencing land outside the boundaries "of any

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"now" was ambiguous based on a 1990 Sixth Circuit case involving disability benefits and two state court cases, each of which post-date the IRA's enactment by at least 45 years. *Pet. App.*, 20. In light of the overwhelming evidence of the 1934 Congress' intent discussed *infra*, those decisions did not and could not establish ambiguity. *Cf. Cline*, 540 U.S. at 594 n.6 (finding overwhelming weight of authority to favor finding a lack of ambiguity, even though one court had reached the opposite conclusion on the same issue).

Indian reservation *now existing or established hereafter*." (emphasis added). Section 472 further illustrates the point, referring to "positions maintained, *now or hereafter*, by the Indian Office." (emphasis added). Thus, viewing Section 479 in context strongly supports the conclusion that by using "now", Congress intended to limit the Act's application to tribes recognized and under federal jurisdiction in 1934. Had Congress intended the First Circuit's reading—that land can be taken into trust on behalf of tribes recognized at any time—Congress would have used "now or hereafter," or similar language, or simply deleted the word "now" altogether.

It is difficult to see how Congress could have more definitively drawn this distinction. Indeed, less than one month before it enacted the IRA, the same Congress amended the 1874 statute at issue in *Montana*—which granted citizenship to "children of persons who *now* are, or have been citizens of the United States" and thus applied only to individuals who were citizens "*on* . . . the effective date of the . . . statute"—to "finally grant[] citizenship rights to the foreign-born children of citizen mothers." *Montana*, 366 U.S. at 310-312 (first emphasis added; second in original). In so doing, Congress "not only specifically made the provision prospective, but further made clear its view that this was a reversal of prior law." *Id.* at 312 (citing H.R. Rep. No. 131, 73d Cong., 1st Sess., p.2 and S. Rep. No. 865, 73d Cong., 2d Sess., p.1). Thus, there can be no doubt that the 1934 Congress intended "now" in Section 479 to mean at the time of enactment.

The First Circuit's response to the clear textual and contextual expressions of congressional intent was to conclude that because Congress used specific dates in other IRA provisions, its use of "now" in Section 479 was somehow ambiguous and could reasonably be read to mean "now or hereafter." *Pet. App.*, 20-21. That conclusion is premised on two obvious errors. The first was to find ambiguity because Section 479 "specifies the date of June 1, 1934 as the relevant date for determining eligibility [under the IRA] based on 'residing within the present boundaries of any Indian reservation.'" *Pet. App.*, 20. There simply is no inconsistency in Congress' use of "now" to refer to the IRA's effective date—June 18, 1934—and Congress' use of "June 1, 1934", a different set date, to measure certain individuals' status.

The First Circuit's second error with regard to this argument was to find that Section 18 of the IRA—codified as 25 U.S.C. § 478—"requir[ed] elections [under the IRA] to be held 'within one year after June 18, 1934,'" and to use that to support its conclusion that if Congress had intended "now" to mean at the time of enactment in Section 479, Congress would have used "June 18, 1934" instead. *Pet. App.*, 21 (quoting 25 U.S.C. § 478). Even if the use of a specific date in that section could somehow make "now" ambiguous (which it could not), the text of that section of the IRA as Congress passed it did not reference a specific date at all. Rather, it provided, in pertinent part, that "[i]t shall be the duty of the Secretary of the Interior, *within one year after the passage and approval of this Act*, to call such an

election . . . ." 73 P.L. 383, § 18; 48 Stat. 984, 988 (June 18, 1934) (emphasis added).

Thus, Section 18 of the IRA actually undermines the First Circuit's conclusion in two significant respects. The first is that it shows that Congress avoided using specific dates when referencing the IRA's effective date, presumably because the effective date could change during the process of enactment. *See, e.g.*, *Montana*, 366 U.S. at 310 (using "now"—rather than specific date—to refer to date of enactment). The second is that if Congress intended "now" to mean "whenever," it presumably would have allowed tribes to opt out of the IRA within some time period after they become eligible, rather than requiring all tribes—even if they were not recognized or under federal jurisdiction in 1934—to opt out of the IRA by June 1935.

The First Circuit could not dispute the logic of that second proposition and the additional contextual support it provides for the States' argument, but brushed it aside by speculating that "it is difficult to see why any tribe would opt out of a statute designed to benefit it." *Pet. App.*, 28. Again, the lower court's reasoning was premised on clear legal and factual errors. In reality, a number of tribes did decide to opt out of the IRA in 1935, and the First Circuit was wrong to assume the provision was superfluous. *See, e.g.*, *Washington v. Confederated Tribes of the Colville Indian Reserv.*, 447 U.S. 134, 143 n.11 (1980) (noting that the Lummi and Colville Tribes "voted in 1935 not to come under" the IRA). The court's strained reading of the text would lead to the absurd result that all

post-1934 tribes will be forced to adopt the IRA even if they would choose not to do so. It is difficult to see how forcing post-1934 tribes to accept a federal scheme other tribes have decided to reject would further tribal sovereignty.

Ultimately, the IRA's language establishing "now" as the date of enactment "is as clear and explicit as could be employed." *The Cherokee Tobacco*, 78 U.S. 616, 620 (1870). There is simply nothing in either the text or the context of Section 479 to support the Secretary's reading of "now" to mean whenever in the future the Secretary chooses to act, and the First Circuit erred by stretching to create ambiguity where none exists to accommodate the Secretary's incorrect reading. As this Court has held:

> There being no ambiguity, there is no room for construction. It would be out of place. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it. Further discussion of the subject is unnecessary. . . . The effort may confuse and obscure but cannot enlighten. It never strengthens the pre-existing conviction.

Id.; *cf. Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (holding statute to be unambiguous despite erroneous statutory language that arguably supported tribe's reading).

B. THE PLAIN READING OF THE IRA IS CONSISTENT WITH ITS BACKGROUND AND LEGISLATIVE HISTORY

Given the clarity with which both the text and the context of Section 479 establish that "now" means at the time of enactment, the First Circuit erred by looking to the IRA's legislative history and the circumstances surrounding its enactment. *See, e.g.*, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, ___ U.S. __, 127 S. Ct. 1534 (2007). Further, even if an examination of the background and legislative history of the IRA were appropriate in this case, that background and history does not support the Secretary's reading and certainly cannot overcome the Act's clear text.

The legislative history of the IRA's "now" limitation is consistent with Congress' intent to limit the IRA's application to 1934 tribes. Specifically, Representative Howard and Commissioner of Indian Affairs Collier—two key players in the IRA's enactment—made statements that directly indicate that the IRA was intended to apply only to tribes recognized as of 1934. Representative Howard stated that Section 479 "'defines the persons who shall be classified as Indian. In essence, it recognizes the *status quo of present reservation Indians* and further includes all other persons of one-fourth Indian blood.'" *Pet. App.*, 26 (emphasis added). On its face, that reference to the *status quo* of reservation Indians clearly indicates that the IRA applies only to tribes

recognized and under federal jurisdiction in 1934, consistent with its plain text.

Commissioner Collier spoke even more clearly on this issue. An early draft of the IRA defined "Indian" to *inter alia* "'include all persons of Indian descent who are members of any recognized Indian tribe.'" *Pet. App.*, 23-25. Senators expressed concern about whether that definition would sufficiently ensure *bona fide* status and, in response, Commissioner Collier proposed the "now" limitation, which Congress ultimately adopted. *Id.*

The First Circuit took that evidence—which is entirely consistent with the IRA's plain text and purposes—and twisted it into a source of ambiguity. Specifically, it concluded that "although none of the parties have raised this, it may well be that the phrase 'now under federal jurisdiction,' was intended to modify not 'recognized Indian tribe,' but rather 'all persons of Indian descent.'" *Pet. App.*, 25. This speculation was not only improper, it also conflicts with both common sense and the rules of grammar. By its terms, the statute applies to "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. It strains credulity to claim that the "now" was intended to modify "members" rather than "tribe." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (reversing statutory reading contrary to "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). The weakness of this interpretation is presumably why the federal

respondents did not make the argument below and why the First Circuit was forced to create it out of whole cloth.

Reading the IRA to apply only to tribes recognized and under federal jurisdiction in 1934 is not only consistent with the legislative history directly related to the "now" limitation, it is also entirely consistent with the Act's broader purposes and history. The IRA was intended to help remediate the impact on then-recognized tribes of pre-1934 federal policies and bureaucratic failings. Specifically, this Court has recognized that "[t]he intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative *destroyed by a century of oppression and paternalism.*'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (emphasis added) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934) and citing S. Rep. No. 1080, 73d Cong., 2d Sess., 1 (1934)).

One of the primary aspects of that past oppression and paternalism was the federal government's policy of allotment, which began with the passage of the General Allotment Act of 1887 and lasted until 1934, when the IRA was enacted. During the allotment period, two-thirds of former Indian lands were acquired by non-Indians. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The IRA brought "'an abrupt end'" to that allotment policy and reflected a "broad effort to promote economic development among American Indians, *with a special emphasis on preventing and*

recouping losses of land caused by previous federal policies." *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008) (*per curiam*) (emphasis added) (quoting *County of Yakima*, 402 U.S. at 255).[4]

Although seeking to remedy losses of land by tribes that had been subjected to the federal government's discontinued allotment policy was one of the IRA's key purposes, the Act also sought to remediate the consequences of "deficiencies in the Interior Department's performance of its responsibilities" to protect the assets of recognized tribes under federal jurisdiction prior to 1934. *United States v. Mitchell*, 463 U.S. 206, 220 (1983). For example, the Department of Interior's failure to adequately protect Indian timber led Congress to enact Section 6 of the IRA—codified at 25 U.S.C. § 466—which "expressly directed that the Interior Department manage Indian forest resources 'on the principle of sustained-yield management.'" *Id.* at 221 (quoting 25 U.S.C. § 466).

In the debates concerning the IRA, Representative Howard characterized the "relationship between the Indians and the government as a 'sacred trust,'" and attributed the "'*present plight* of the average Indian'" to "'[the] failure of their governmental guardian to conserve the Indians' land and assets and the consequent

[4] To the extent the IRA's purpose was to remediate losses caused by the allotment policy, it also counsels against applying the Act to tribes in Rhode Island and other colonial states, which were not subject to the federal allotment policies.

loss of income or earning power.'" *Id.* (emphasis added) (quoting 78 Cong. Rec., at 11726 (remarks of Rep. Howard)). Commissioner Collier, a principal author of the IRA, echoed those sentiments, imploring Congress to "'stop the slaughtering of Indian timber lands.'" *Id.* at 221 n.21 (quoting Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1, p. 35 (1934)).

Those dual purposes—to remedy the impact of allotment on existing Indian lands and Interior Department deficiencies on existing Indian assets—are entirely consistent with reading the IRA as it was written: that is, to apply only to tribes recognized and under federal jurisdiction in 1934. It was eminently reasonable for Congress to direct its remedial efforts toward the tribes that had suffered as a result of disastrous federal policies and bureaucratic failings, rather than allocating scarce resources to tribes that, from the federal government's perspective, did not yet exist and would not be subjected to those policies.[5]

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[5] As of the IRA's enactment, the Narragansett Tribe had little, if any, relationship with the federal government. Indeed, as late as 1978, the Solicitor of the Department of the Interior testified before Congress that "the Interior Department ha[d] never determined that . . . the Narragansett Tribe . . . is entitled to tribal status or the Federal services that flow from that status" and that there had never been a judicial determination that the Narragansetts were an Indian tribe. *Joint Committee Hearing on S. 3153 and H.R. 12860*, 121

The First Circuit itself acknowledged that one of the purposes of the IRA was to "remed[y] the perceived ills of the prior practice of allotment" and that allotment "would not have affected later-recognized tribes, and hence there would have been no reason to include such tribes within the ambit of the statute." *Pet. App.*, 21. The court nonetheless accepted, without citing any supporting case law or legislative history, "[t]he Secretary's . . . view that the Act was intended not only to remedy past wrongs, but also to set a template for the future that would encourage the strength and stability of tribal communities." *Pet. App.*, 21. The court then concluded—again without citing any authority—that "[b]ased on this view, it would make no sense to distinguish among tribes based on the happenstance of their federal recognition status in 1934" and noted that several of the IRA's provisions "have nothing to do with land consolidation." *Id.*

The First Circuit's view is a textbook example of a court failing to heed this Court's warnings about improperly substituting an agency's policy determination for Congress' intent as reflected in the text of the statute. *See, e.g.*, *Zuni*, 127 S. Ct. at 1543. The IRA's text is clear, and limiting its application to tribes recognized and under federal jurisdiction in 1934 is consistent with its purposes.

The Secretary and the First Circuit may believe it would have "made more sense" for

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(June 20, 1978) (Statement of Leo M. Krulitz, Solicitor, Department of the Interior).

Congress to apply the IRA to all tribes, but that simply is not their decision to make. Allowing the First Circuit's decision to stand would give the clear "impression that agency policy concerns, rather than the traditional tools of statutory construction, are shaping the judicial interpretation of statutes." *Id.* at 1551 (Kennedy, J., concurring). Indeed, the First Circuit's reliance on legislative history to support the Secretary's counter-textual reading in this case is "nothing other than the elevation of judge-supposed legislative intent over clear statutory text." *Id.* at 1551 (Scalia, J., dissenting). That is always a dangerous proposition, but the danger is particularly acute here given that the Secretary has a guardianship responsibility to this Tribe and other tribes that makes careful judicial oversight all the more important to protect the interests of the States and their citizens.

Put simply, the First Circuit failed "to adhere to [its] . . . constitutional role[] . . . [to] determine intent from the statute before [it]." *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004). Faced with clear expressions of congressional intent at every turn, the First Circuit strained to find some basis to conclude there is ambiguity that would allow it to defer to the Secretary's erroneous interpretation of the IRA. Indeed the court went so far as to create arguments to support the Secretary's position. That was error. The tools of statutory construction make clear that Congress means what it said, and that applying the IRA in accordance with its plain text is entirely consistent with the Act's purposes.

Moreover, the First Circuit's contortions to support the Secretary's interpretation were unnecessary. Reading the IRA as it is written does not leave post-1934 tribes unable to obtain land. It simply ensures that such grants of land are made by Congress, not the Secretary, pursuant to settlement acts that the States have approved. That guarantees that the States and their citizens have the full ability to protect their interests through the democratic process. A number of post-1934 tribes—including the Narragansett Tribe—have benefitted from that process, which permits the careful weighing of interests that is appropriate when such sensitive issues involving core sovereign interests are at stake.[6]

C. THE PRINCIPLES UNDERLYING *BRAND X* PRECLUDED THE SECRETARY FROM ADOPTING A READING CONTRARY TO A PRIOR JUDICIAL HOLDING

In *Chevron*, this Court made clear that courts—not agencies—ultimately determine whether a statute is ambiguous and therefore provides an agency with gaps to fill using its discretion. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Consistent with that principle, this Court recently held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior decision holds that its

[6] A list of settlement acts is located at page 1 of the appendix.

construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Brand X*"). Consequently, even if there were ambiguity in the IRA, the Fifth Circuit's 1974 decision in *State Tax* precluded the Secretary from adopting regulations ignoring the existing judicial interpretation of the Act.[7]

Although the First Circuit relied on *Brand X* in rejecting Rhode Island's claim that the Secretary's interpretations had changed over time and were therefore not entitled to deference, *Pet. App.*, 37, the court wholly ignored the impact under the first step of *Brand X* of the Fifth Circuit's holding in *State Tax* that the IRA's plain text "positively dictates that tribal status is to be determined as of June, 1934, as indicated by the words any recognized Indian tribe *now* under Federal jurisdiction and the additional language to like effect." *State Tax Comm'n*, 505 F.2d at 642 (emphasis in original) (quotation marks omitted). That was clear error.

The Part 151 regulations interpreting the IRA to allow acquisitions on behalf of all tribes whenever they were recognized (with some exceptions) were adopted in 1980, six years after the Fifth Circuit's holding. When those regulations

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[7] This is not to say that other *courts* could not disagree with the Fifth Circuit's holding, only that once a court had held the IRA was unambiguous the Secretary could not effectively reverse that decision.

were enacted, no Court had disagreed with the Fifth Circuit's decision and, indeed, this Court had indicated that the IRA applied only to tribes recognized and under federal jurisdiction in 1934. *See United States v. John,* 437 U.S. 634, 650 (1978). The agency's implementation of regulations directly contrary to the unanimous judicial interpretations of the operative statute is an example of agency overreaching to expand its power contrary to the unambiguous text of the statute as interpreted by the courts.

The agency's actions in the face of court decisions finding no ambiguity directly contradict this Court's decision in *Brand X*. The Federal Respondents' treatment of this issue in their opposition to the petition for *certiorari* in this case is telling. They were unable to avoid the clear conclusion that the Fifth Circuit's holding that the IRA's text "positively dictates" that tribal status be determined as of 1934 unambiguously foreclosed the Secretary's contrary interpretation, *State Tax*, 505 F.2d at 642,[8] so they were forced to argue that

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[8] Although the Fifth Circuit did not use the term "unambiguous," it looked only at the text of the IRA in holding that the Act created a temporal limitation and gave no indication that it saw any other permissible construction of the Act. Thus, it appears clear that the Fifth Circuit's holding "'determined [the IRA's] . . . *clear* meaning'" and therefore could not be reversed by the agency's subsequent interpretation. *Brand X*, 545 U.S. at 984 (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (emphasis in *Brand X*)).

"the Fifth Circuit's 1974 analysis . . . cannot dictate the construction of Section 19 under *Brand X*, because it predates the rulemaking that adopted the Part 151 regulations." *Resp. Br. in Opp. to Cert.*, 10. That is a complete misreading of *Brand X*, which addressed the impact of a prior judicial ruling on agency action and expressly held that "[a] court's *prior judicial construction of a statute* trumps an agency construction otherwise entitled to *Chevron* deference . . . *if the prior decision* holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982 (emphasis added).[9] Thus, it is clear that when enacting the regulations, the Secretary improperly contravened an existing judicial holding that the IRA applied only to tribes recognized and under federal jurisdiction in 1934.

Chevron reiterated the well-established principle that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9 (citing cases). As *Chevron* noted and *Brand X* reinforced, it necessarily follows that "if a court . . . ascertains that Congress had an intention on the

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[9] The fact that the Fifth Circuit's decision and the promulgation of the Part 151 regulations predated this Court's decision in *Chevron* does not alter the analysis. *See Chevron*, 467 U.S. at 845 (noting that *Chevron* analysis clearly followed from "well-settled principles"); *see also Sullivan v. Everhart*, 494 U.S. 83, 103 (1990) (Stevens, J., dissenting).

precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. The Fifth Circuit considered the precise question presented here and ascertained—as has every other circuit court but the First Circuit—that the plain text "positively dictates that tribal status is to be determined as of June, 1934." *State Tax Comm'n*, 505 F.2d at 642. The Secretary could not properly ignore that holding to expand his power beyond the limits created by Congress and recognized by the judiciary.

II. THE FIRST CIRCUIT MISCONSTRUED THE SETTLEMENT ACT

The text and history of the Rhode Island Settlement Act establish that it was intended to ensure that Rhode Island would maintain civil and criminal jurisdiction throughout the state (including the settlement lands), in exchange for the Tribe being given a substantial land base worth several million dollars at the time of the settlement. Nonetheless, the First Circuit concluded that the Secretary could effectively undo that agreement administratively decades after the fact by taking land into trust on behalf of the Tribe, thereby largely removing that land from state jurisdiction. Aside from the fact that the IRA makes clear that the Secretary has no authority to take land into trust on behalf of a post-1934 Tribe, reading such a "gaping loophole" into the Settlement Act—contrary to its text and history—was clear error. *Pet. App.*, 80 (Selya, J., dissenting). If allowed to stand, that error will impact States nationwide, both those that have already negotiated settlement agreements and

those that will consider entering into such agreements in the future.

The evidence strongly supports the conclusion that Congress intended the Settlement Act to be the final settlement of any and all claims to land the Tribe might bring and thus preclude the Tribe from enlisting the Secretary to take land outside the settlement lands into trust on the Tribe's behalf. As an initial matter, the Settlement Act's text makes clear that it was intended to preserve the State's civil and criminal jurisdiction throughout Rhode Island.

The Act accomplished this in two steps. First, it expressly preserved the State's jurisdiction as to the approximately 1800 acres of settlement lands provided to the Tribe free of charge in connection with the settlement (while still allowing the Tribe "to establish its own regulations concerning hunting and fishing on the settlement lands"). 25 U.S.C. §§ 1706(a)(3) & 1708(a). Then, the Act precluded the Tribe—or any other tribe—from stripping land outside the settlement lands from the State's jurisdiction by validating all previous transfers of land within Rhode Island, extinguishing all aboriginal title throughout the State and extinguishing all Indian claims "based upon any interest in or right involving such land (including but not limited to claims for trespass damages or claims for use and occupancy) . . . ." 25 U.S.C. § 1705; *see also* 25 U.S.C. § 1712. Thus, by its terms, the Act's text reflects Congress' intent to preserve the State's civil and criminal jurisdiction throughout Rhode Island, while providing the Tribe a substantial land base and allowing it some

limited control over hunting and fishing within that land base.

The Settlement Act's legislative history likewise supports Rhode Island's reading of the Act. The Settlement Act was the culmination of years of difficult and intensive negotiations among the parties, with the Tribe represented by counsel and obtaining the benefit of favorable pre-trial court rulings on important issues. H.R. Rep. 95-395, p. 6. The end result was that, in return for a generous land base worth several million dollars, the Tribe agreed to extinguish any Indian claims it had to lands—other than the settlement lands—anywhere in the United States. In addition, Congress went even further and extinguished all Indian land claims—by any tribe—within the Rhode Island. This was necessary because "[e]xtinguishment of all potential Indian claims within the state was a precondition to any settlement of the Narragansett claim by the state government." H.R. Rep. 95-395, p. 13. The First Circuit had previously recognized this, noting that "through the Settlement Act 'the tribe abandoned any right to an autonomous enclave, submitting itself to state law as a quid pro quo for obtaining the land that it cherished.'" *Pet. App.*, 74 (Howard, J., dissenting) (quoting *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 22 (1st Cir. 2006) (*en banc*)).

Not surprisingly, the Tribe was initially pleased with the settlement and its representative testified before Congress that "[t]he bills are the result of a course of fair and honorable dealings between Indians and non-Indians, which is rare in the history of this country." *Joint Committee*

Hearing, 112 (Statement of Eric Thomas, Tribal Secretary, Naragansett Tribe). The Tribe understood "that the State of Rhode Island wanted to have it clear that there would not be Indian claims in the future in Rhode Island," and agreed that the settlement and extinguishment were equitable. *Id.* at 113 (Statements of Thomas Tureen, Tribal Attorney and Ferris Dove, Narragansett Councilman). Ultimately, the Tribe hoped that the settlement would "open the door for a new age of mutual understanding and trust between our people and our neighbors." *Id.* at 112 (Statement of Eric Thomas, Tribal Secretary, Narragansett Tribe).

Unfortunately, the good feelings engendered by the settlement did not last long, and the Tribe began to chafe at the state jurisdiction it had agreed to under the Settlement Act in exchange for the settlement lands. The Tribe's efforts to avoid state jurisdiction continued with the parcel at issue in this case.[10] After the Tribe purchased the parcel—which is outside the settlement lands but within the aboriginal lands claimed by the Tribe in

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[10] There are several other examples of the Tribe's efforts to undermine the state jurisdiction established by the Settlement Act. The most recent involved the Tribe's unsuccessful claim that it was exempt from state cigarette tax requirements and marketing that claimed exemption by operating a smoke shop on settlement lands "sell[ing] unstamped, untaxed cigarettes at prices substantially below market." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 20 (1st Cir. 2006) (*en banc*), *cert. denied*, 127 S.Ct. 673 (2006).

its land claim suit—the Tribe argued that those lands immediately became "Indian country" outside the reach of state law and that the Tribe could therefore construct "a housing complex without obtaining various permits and approvals pursuant to state law and local ordinances." *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 911 (1st Cir. 1996). After the First Circuit rebuffed the Tribe's claim, the Tribe filed the trust application that led to this suit. *Pet. App.*, 12-14. Thus, this action is simply the Tribe's latest attempt to keep the benefit of its bargain—the settlement lands—while depriving Rhode Island of the benefit of its bargain, namely, the state jurisdiction that was a clear precondition to the settlement.

The First Circuit majority ignored that history and the evidence of Congress' intent in both the Settlement Act's text and legislative history to reach an absurd result that grants the Tribe the power to unilaterally undo the Settlement Act by enlisting the Secretary to take land into trust. That gives the Tribe and the Secretary the ability to "swap the Settlement Lands for adjacent lands and undo any limitations contained in the Settlement Act." *Pet. App.*, 76 (Howard, J., dissenting). That was certainly not what Congress had accomplished and intended in the Settlement Act, and there is not a shred of evidence that it is what the parties intended. Indeed, when the Settlement Act was signed into law in October 1978, both this Court and the Fifth Circuit (the only courts to have addressed the issue) had indicated that the Tribe—which was not recognized by the federal government in 1934 and had not

even been recognized in 1978—would never be eligible to have land taken into trust on its behalf under the IRA at all.

The First Circuit's response to this glaring hole in its argument is to claim that "the State misses the point that what is at issue is not what the *Tribe* may do in the exercise of its rights, but what the *Secretary* may do." *Pet. App.*, 44 (emphasis added). That ignores the fact that it is the Tribe—not the Secretary—that initiates the land into trust process. 25 C.F.R. § 151.9 ("An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary."). The Settlement Act—and the agreement it embodies—clearly precluded the Tribe from pressing such a claim, which is a quintessential claim "'raised by *Indians qua Indians*.'" *Pet. App.,* 74-75 (Howard, J., dissenting) (quoting H.R. Rep. 95-1453, at 12). Thus, there was no statutory authority for the acquisition and the Secretary was bound to deny the Tribe's request. 25 C.F.R. § 151.10 (requiring the Secretary to consider limitations on the statutory authority for an acquisition).

Ultimately, as the dissents by Judge Howard and Judge Selya establish, a review of the evidence of Congress' intent with regard to the Settlement Act leads inexorably to the conclusion that the Act was intended to preclude the expansion of tribal sovereignty to lands outside the settlement area. Following extensive negotiations, the Settlement Act gave the Tribe 1800 acres of land worth several million dollars. In exchange, the Tribe willingly

agreed to be subject to the State's jurisdiction and not to press Indian claims to other lands within the State. The Secretary should not now—30 years after the fact—be permitted to upset this agreement at the Tribe's request through "the contrivance of the Secretary's taking the Parcel into trust, to walk away from an arrangement that it helped to fashion and from which it has benefitted over the years." *Pet. App.*, 81 (Selya, J., dissenting). Allowing the Secretary to do so will cast serious doubt on the ability of settlement acts generally to resolve Indian claims, and severely reduce States' incentive to negotiate and enter into such agreements.

III. THE FIRST CIRCUIT'S ERRONEOUS DECISION WILL HAVE SUBSTANTIAL NEGATIVE IMPACTS ON STATES NATIONWIDE

This case illustrates the real-world consequences of taking land into trust. Land taken into trust is removed from state authority in several respects, including taxation, land use restrictions and certain environmental regulations. Here, the Tribe purchased the parcel at issue outside the settlement lands and—based on that purchase—claimed the authority to construct a housing complex without complying with the permitting and approval processes designed to ensure that structure's safety. *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 910 (1st Cir. 1996).

When the First Circuit rightly rebuffed that initial attempt by the Tribe to unilaterally remove

lands from state jurisdiction, the Tribe enlisted the Secretary to take the land into trust in another effort to avoid the permitting requirements. *Pet. App.*, 13-14. This time the Tribe succeeded at the First Circuit, and, if that decision is allowed to stand, the Tribe will be able to construct its housing complex without obtaining the necessary approvals.

The consequences of the First Circuit's decision are more than hypothetical. Within the settlement lands Rhode Island has full civil and criminal jurisdiction to *inter alia* protect health and safety. 25 U.S.C. § 1708. The sole limitation on that jurisdiction is that the Tribe has the authority, "after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands." 25 U.S.C. § 1706(a)(3). However, even within that core of retained tribal sovereignty in the areas of hunting and fishing, Rhode Island is given the ability to require that the Tribe establish "minimum standards" that ensure the "safety of persons and protection of wildlife and fish stock" within the settlement lands. *Id.*

Under the First Circuit's decision, Rhode Island will have no authority to protect health and safety on the parcel acquired in trust, or presumably any other parcels the Tribe subsequently purchases within Rhode Island and has the Secretary take into trust. This leads to the bizarre result that the State—which fought to retain its jurisdiction over all lands within its borders—has more authority to protect a fish on the settlement lands than it does to protect the

humans on the trust lands. That is not the result Congress intended, and recent events illustrate the serious public safety concerns that can follow from inadequate building codes. *See, e.g.*, Chris Patsilelis, *The storm that smashed New England*, Houston Chron., Oct. 5, 2003, at 21 (discussing "the great New England hurricane of 1938 [which] was among the most catastrophic natural disasters in U.S. history," and struck Charlestown, Rhode Island).

Although the First Circuit's decision will have serious consequences for Rhode Island, its repercussions will be felt throughout the nation. By reading the "now" limitation out of the IRA, the Secretary has vastly expanded the scope of his trust power to allow himself to take land into trust on behalf of any tribe, whenever recognized.[11] That poses a significant threat to the States, particularly in light of many post-1934 tribes' growing wealth resulting from Indian gaming. *See, e.g.*, *Connecticut v. DOI*, 228 F.3d 82, 85 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001) (noting that "[i]n

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[11] As of January 1947, there were "195 tribes, bands, and communities, or groups thereof, which [were] under the Indian Reorganization Act, excluding Indians in Oklahoma and Alaska," which were not initially covered by many of the IRA's provisions. U.S. Indian Serv., *Ten Years of Tribal Government Under I.R.A.*, 2-3 (1947). By contrast, as of 2008, there were 300 such tribes. *See* Dep't of the Interior, *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 73 F.R. 18553 (April 4, 2008).

less than a decade the . . . Mashantucket Pequot Tribe developed one of the most profitable casinos in the United States . . . grossing nearly $1 billion annually"). For example, in discussing the Mashantucket Pequot Tribe—recognized in 1983 pursuant to a settlement act—the Second Circuit noted that:

> Motivating all of plaintiffs' arguments is their final claim that a decision today in defendants' favor would theoretically make it possible for the Secretary to take into trust virtually all of southeastern Connecticut. And indeed, we find nothing in the Settlement Act itself that would prevent such a result.

Id. at 94. Thus, the trust power has the capacity to change the character of an entire state. Allowing the Secretary to unilaterally expand his ability to exercise such far-reaching power beyond the clear limits Congress established is untenable. The First Circuit's decision should be reversed.

CONCLUSION

For the foregoing reasons, the *Amici* States respectfully request that the Court reverse the First Circuit's decision.

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LIST OF SETTLEMENT ACTS

Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. § 941 *et seq.*

Rhode Island Land Claims Settlement, 25 U.S.C. § 1701 *et seq.*

Maine Indian Claims Settlement, 25 U.S.C. § 1721 *et seq.*

Florida Indian (Miccosukee) Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Connecticut Indian Land Claims Settlement, 25 U.S.C. § 1751 *et seq.*

Massachusetts Indian Land Claims Settlement, 25 U.S.C. § 1741 *et seq.*

Florida Indian (Seminole) Land Claims Settlement, 25 U.S.C. § 1772 *et seq.*

Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. § 1773 *et seq.*

Seneca Nation (New York) Land Claims Settlement, 25 U.S.C. § 1774 *et seq.*

Mohegan Nation (Connecticut) Land Claims Settlement, 25 U.S.C. § 1775 *et seq.*

Crow Land Claims Settlement, 25 U.S.C. § 1776 *et seq.* (impacting lands in Montana).

Santo Domingo Pueblo Land Claims Settlement, 25 U.S.C. § 1777 *et seq.* (impacting lands in New Mexico).

Torres-Martinez Desert Cahuilla Indians Claims Settlement, 25 U.S.C. § 1778 *et seq.*

Cherokee, Choctaw and Chickasaw Nations Claims Settlement, 25 U.S.C. § 1779 *et seq.* (impacting lands in Oklahoma).

Pueblo De San Ildefonso Claims Settlement, 25 U.S.C. § 1780 *et seq.* (impacting federal land); *Alaska Native Claims Settlement Act*, 43 U.S.C. § 1601 *et seq.*